PD-0948-17
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 11/30/2017 6:16 PM
Accepted 12/1/2017 9:40 AM
DEANA WILLIAMSON
CLERK

No. PD-0948-17

**IN THE
COURT OF CRIMINAL APPEALS
OF TEXAS**

FILED
COURT OF CRIMINAL APPEALS
12/1/2017
DEANA WILLIAMSON, CLERK

THE STATE OF TEXAS **APPELLANT**

V.

CRISPEN HANSON **APPELLEE**

THE STATE'S BRIEF ON PETITION FOR DISCRETIONARY REVIEW

**FROM THE COURT OF APPEALS, EIGHTH DISTRICT OF TEXAS
CAUSE NUMBER 08-15-00205-CR**

JAIME ESPARZA
DISTRICT ATTORNEY
34th JUDICIAL DISTRICT

RAQUEL LOPEZ
ASST. DISTRICT ATTORNEY
DISTRICT ATTORNEY'S OFFICE
201 EL PASO COUNTY COURTHOUSE
500 E. SAN ANTONIO
EL PASO, TEXAS 79901
(915) 546-2059 ext. 4503
FAX (915) 533-5520
EMAIL raqlopez@epcounty.com
SBN 24092721

ATTORNEYS FOR THE STATE

IDENTITY OF PARTIES AND COUNSEL

APPELLANT: The State of Texas, District Attorney, 34th Judicial District, represented in the trial court by:

Jaime Esparza, District Attorney
Humberto Acosta, Assistant District Attorney
Alyssa Nava, Assistant District Attorney
500 E. San Antonio, Suite 201
El Paso, Texas 79901

and on appeal and petition for discretionary review by:

Jaime Esparza, District Attorney
Raquel López, Assistant District Attorney
500 E. San Antonio, Suite 201
El Paso, Texas 79901

APPELLEE: Crispen Hanson, represented in the trial court by:

Jorge Rivas, 521 Texas Ave.
El Paso, Texas 79901

and on appeal by:

Ruben P. Morales
718 Myrtle
El Paso, Texas 79901

TRIAL COURT: 243rd Judicial District Court of El Paso County, Texas, Honorable Judge Luis Aguilar, presiding

COURT OF APPEALS: Eighth Court of Appeals, Honorable Chief Justice Ann Crawford McClure, Justice Yvonne T. Rodriguez, and Justice Steven L. Hughes (Hughes, J., not participating)

TABLE OF CONTENTS

INDEX OF AUTHORITIES

STATE CASES

STATUTES

RULES

REFERENCE MATERIALS

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Crispen Hanson ("Hanson"), appellee, was indicted for capital murder (Count I), murder (Count II), and injury to a child (Counts III and IV). (CR:10-13).[1] In exchange for dismissal of Counts I (capital murder) and II (murder), Hanson pleaded guilty to Counts III and IV (injury to child) on January 16, 2015, and was sentenced, in open court, to eight years' confinement. (CR:204-08, 255); (RR2:5-8). On June 15, 2015, upon the trial court's *sua sponte* motion, the trial court suspended further imposition of Hanson's eight-year prison sentence and placed him on eight years' community supervision ("shock probation"). (CR:336-37, 340-42).[2] On June 25, 2015, the trial court entered an amended order (with additional fact findings) suspending further imposition of Hanson's prison sentence and placing him on community supervision. (CR:353-56). On July 13,

---

[1] Throughout this brief, references to the record will be made as follows: references to the clerk's record will be made as "CR" and page number, and references to the reporter's record will be made as "RR" and volume and page number.

[2] On April 14, 2015, after Hanson had begun serving his eight-year prison sentence and his felony conviction had become final, the trial court released Hanson from confinement "to the streets." (CR:309-10). The State filed a petition for writ of mandamus on May 13, 2015, which the Eighth Court ordered be considered a companion case to this State's appeal. *See* (Order dated July 16, 2015, in the Eighth Court's file on related original proceeding, 08-15-00161-CR, *available at* http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=39d85c79-e333-422f-81a8-82510446de7d&coa=coa08&DT=Other&MediaID=dc28820c-39da-4918-9b21-9ec584432af8). As a result of the trial court's order placing Hanson on shock probation, the Eighth Court dismissed the original proceeding as moot. *See In re State*, No. 08-15-00161-CR, 2017 WL 3167482, at *2 (Tex.App.–El Paso July 26, 2017, orig. proceeding)(not designated for publication).

2015, the State filed notice of appeal of the trial court's amended order. (CR:360-63).

On July 26, 2017, in an unpublished opinion, the Eighth Court of Appeals held that the State's notice of appeal was untimely and thus dismissed this State's appeal for lack of jurisdiction. *See State v. Hanson*, No. 08-15-00205-CR, 2017 WL 3167484, at *3 (Tex.App.–El Paso July 26, 2017, pet. granted)(not designated for publication). No motion for rehearing was filed by the State.

The State timely filed its petition for discretionary review ("PDR") on August 25, 2017. This Court granted the State's PDR on November 1, 2017, with the notation that oral argument will not be permitted.

GROUNDS FOR REVIEW

GROUND FOR REVIEW ONE: Where, regardless of whether the shock-probation order was "original" or "amended," because it is a type of order identified as appealable under the plain language of article 44.01, and because the State's notice of appeal was filed within 20 days from the amended order's entry, the Eighth Court, in holding that the State's notice of appeal was untimely and dismissing the State's appeal for lack of jurisdiction, failed to give effect to the plain language of article 44.01 and thus erred.

GROUND FOR REVIEW TWO: Where, by entering an amended order, the trial court indicated its intent to supercede its original shock-probation order, and where the trial court's amended order contained additional fact findings that were a statutory prerequisite to the proper granting of shock probation, the Eighth Court erred in holding that it was the original (not the amended) order that constituted an "appealable" order. The State's notice of appeal from the amended order was therefore timely.

FACTUAL SUMMARY

On July 13, 2012, a four-count indictment was returned against Hanson for capital murder (Count I), murder (Count II), and injury to a child (Counts III and IV). (CR:10-13). On January 16, 2015, pursuant to a plea agreement, Hanson pleaded guilty to Counts III and IV (injury to child) in exchange for the State's dismissal of Counts I (capital murder) and II (murder). (CR:206-08, 255); (RR2:5-8). As part of the plea agreement, Hanson executed a written waiver of "the right, if any should exist,...to request dismissal or suspension of further execution of sentence under any circumstance or for any reason without first obtaining the express written consent or approval of the attorney representing the State of Texas" and "further agree[d] that no such...suspension shall be effective without the express written agreement of the attorney representing the State of Texas." (CR:253). The trial court's approval of the plea agreement also included a finding that Hanson had "waived his right to seek *or permit* the suspension of further execution of sentence on his behalf pursuant to [sic] without the express agreement of the State." (CR:257)(emphasis added). After accepting the parties' plea agreement, and pursuant thereto, the trial court sentenced Hanson to eight years' confinement but ordered Hanson to surrender in three weeks so that he

could "get [his] affairs in order." (CR:204, 246); (RR2:8-11).[3]

Thereafter, upon Hanson's request, the trial court delayed Hanson's surrender date for yet another month, and Hanson finally surrendered on March 16, 2015. (CR:279-81, 284); (RR4:6). About a week into his confinement, Hanson filed a motion (and an amended motion) requesting that he be allowed to simply "resume" his bond before his (Hanson's) next medical appointment, asserting that he "had been diagnosed with a rare and serious condition [that] require[d] immediate medical attention." (CR:303-07). Over the State's objection, the trial court released Hanson "to the streets" with no surrender date in place. (CR:309-10).

Because Hanson's felony conviction was final when the trial court released him to the streets, the State filed a petition for writ of mandamus on May 13, 2015, challenging the trial court's release order. *See Hanson*, 2017 WL 3167484 at *1. The next day, the trial court appointed defense counsel to respond to the State's petition for writ of mandamus, who, in turn, advised the trial court that it could address the State's mandamus petition by placing Hanson on shock probation, stating that it was "within [the trial court's] right to suspend further

[3] While the judgment reflects a surrender date of February 2, 2015, the trial court's order to detain reflects a surrender date of February 6, 2015. (CR:204, 246).

implementation of [Hanson's] sentence" under article 42.12 § 6 of the Texas Code of Criminal Procedure (*i.e.*, the shock-probation statute),[4] as long as it held a hearing on the matter and entered its order before the statutory continuing-jurisdiction period expired on July 15, 2015. (CR:311-12, 326-29).[5] On June 11, 2015, the trial court filed a *sua sponte* motion to hold a hearing on whether to suspend further imposition of Hanson's prison sentence and place him on shock probation and set the hearing for June 15, 2015. (CR:336-37–"Court's Sua Sponte Motion to Hold a Hearing to Determine Whether to Suspend the Remainder of the Defendant's Prison Sentence and Place the Defendant on Community Supervision.").

At the conclusion of the hearing held on June 15, 2015, during which the State argued that the trial court was without authority to suspend further execution of Hanson's sentence because Hanson, as part of his plea agreement, had waived any right to seek—or permit on his behalf—any such suspension of his sentence

---

[4] Effective January 1, 2017, Chapter 42A of the Code of Criminal Procedure replaced article 42.12 of the Code of Criminal Procedure, purporting to be a non-substantive revision of article 42.12 in its entirety. TEX. H.B. 2299, 84TH LEG., R.S. (2015). Because the complained-of order was entered on June 25, 2015, (CR:340-46, 353-56), prior to the effective date of the revision, article 42.12 still applies here.

[5] *See* TEX. CODE CRIM. PROC. art. 42.12 § 6(a)(providing for a 180-day continuing-jurisdiction period within which a trial court may suspend further execution of a defendant's sentence and place him on community supervision).

without the State's express, written consent, (RR4:28, 49-50); (CR:253-54, 257),[6] the trial court entered an order titled, "Order Suspending Further Imposition of the Defendant's Sentence of Imprisonment and Placement on Community Supervision for the Remainder of His Sentence," along with a "First Amended Judgment" reflecting the now-suspended prison sentence, as well as the terms and conditions of Hanson's eight-year probation term. (RR4:56); (CR:340-52). The trial court orally announced its ruling but did not make any oral findings of fact. (RR4:56).

In its order, the trial court set out the procedural history of the case, including the date and nature of the original indictment, the date of Hanson's guilty plea, and the fact that the trial court, pursuant to the parties' plea agreement, had sentenced Hanson to an eight-year prison term. (CR:340). Under a section titled, "The Law," the trial court set out the applicable law governing shock probation. (CR:340-42). Next, the trial court stated that Hanson met the statutory qualifications for shock probation and, thereafter, concluded that Hanson's shock-probation-plea-agreement waiver did nothing to curtail the trial court's authority to nonetheless grant him the same. (CR:342).

---

[6] Though the State explained to the trial court that its objection to the suspension of Hanson's sentence under the shock-probation statute was predicated entirely on the terms of the plea agreement, the State was prohibited from cross-examining Hanson on the subject or tendering the plea papers into evidence. (RR4:25-30).

Ten days later, the trial court entered a second order titled, "Amended Order Suspending Further Imposition of the Defendant's Sentence of Imprisonment and Placement on Community Supervision for the Remainder of His Sentence," making and entering fact findings that: (1) accounted for Hanson's general compliance with his bond conditions; (2) asserted that Hanson's previous release was due to medical reasons; (3) reasoned that Hanson had produced evidence that he "maintains a good relationship with his children and is in compliance with all legal support obligations" and that further incarceration would not only hinder Hanson's efforts to seek additional medical testing for himself and his children, but would also create an undue hardship on Hanson, his children, and his parents; and (5) concluded that Hanson would not benefit from further incarceration. (CR:353-54). The trial court's conclusion that Hanson met the statutory qualifications for shock probation remained unchanged. (CR:356).

On July 13, 2015, the State filed its notice of appeal, specifically indicating that it was appealing from the trial court's amended, June 25, 2015, shock-probation order, which fully set out the legal and factual bases for the trial court's ruling and order. (CR:360-62).

On July 26, 2017, in an unpublished opinion, the Eighth Court concluded that, because it was the original shock-probation order—not the amended

one—that controlled the appellate timetables, the State's notice of appeal was due on July 5, 2015, such that its July 13, 2015, notice was untimely, and, as such, the Eighth Court had no jurisdiction to consider the State's appeal. *See Hanson*, 2017 WL 3167484 at *3.

SUMMARY OF THE STATE'S ARGUMENTS

GROUND FOR REVIEW ONE:

The plain language of article 44.01 authorizes the State to take appeal from an order as long as: (1) the appealed-from order falls within one of the enumerated types of orders, regardless of whether it is "amended" or original; and (2) the State takes appeal by the 20th day after the entry of the order to be appealed. By its plain language, article 44.01 makes no distinction between an original, or stand-alone, order and an "amended" one, such that the Eighth Court, by effectively holding that the State did not appeal from an "appealable order" when it appealed from the amended (rather than original) order, it improperly read into article 44.01 an additional requirement that the appealed-from order be a first-in-time, stand-alone, or sole order.

Holding that the State is not allowed to appeal from an "amended" order merely because it is not the original, "substantive" order would lead to the absurd result that the State, as a matter of course, would be forced to appeal from not only the original order, but also each and every subsequent amended order entered by the trial court from the period that the original order was entered to the State's filing of a notice of appeal. Furthermore, permitting the State to take appeal from an amended (not original) order that falls within one of the enumerated, appealable

categories would not interfere with the statutory purpose behind article 44.01 of ensuring that the appellate courts are not bombarded with frivolous, indiscriminate appeals by the State.

For these reasons, the Eighth Court erred in holding that the State's appeal, though filed within 20 days from the entry of the amended order, was untimely as to the original order, and its dismissal of the States's appeal for lack of jurisdiction was likewise erroneous.

GROUND FOR REVIEW TWO:

Under well-settled principles of law, when the trial court entered an amended (rather than a supplemental) shock-probation order, it was presumed to have intended to replace its original shock-probation order, particularly when it was in its amended order that the trial court undertook—for the first time—to properly fulfill the statutory prerequisites of a proper grant of shock probation. And regardless of whether the additions in the amended order were material or substantial, the trial court's entry of the amended order restarted the appellate timetables, such that the State's notice of appeal, filed within 20 days from the amended order, was timely.

But even if, as the Eighth Court held, such a "supercede-and-nullify" rule does not apply in the criminal context, contrary to its characterization of the trial

court's amended order as a "non-substantive" order, unlike in *Antonelli*, the trial court did more than simply "explain" in its amended order its earlier ruling. Rather, the trial court endeavored to make additional judicial determinations to dispense with the statutory requirement that a trial court first determine that a defendant would "not benefit from further incarceration" before placing him on shock probation—a determination which that trial court had not yet made. Thus, it was this exercise in judicial reasoning during the trial court's plenary-power period that operated to fulfill the first and only complete, statutorily compliant grant of shock probation, such that the amended order was an "appealable" order.

As such, the State's notice of appeal, which was filed before the expiration of the statutorily allotted 20-day period, was proper and timely, and for these additional reasons, the Eighth Court's holding to the contrary and dismissal of the State's appeal for lack of jurisdiction was erroneous.

ARGUMENT AND AUTHORITIES

GROUND FOR REVIEW ONE: Where, regardless of whether the shock-probation order was "original" or "amended," because it is a type of order identified as appealable under the plain language of article 44.01, and because the State's notice of appeal was filed within 20 days from the amended order's entry, the Eighth Court, in holding that the State's notice of appeal was untimely and dismissing the State's appeal for lack of jurisdiction, failed to give effect to the plain language of article 44.01 and thus erred.

In its unpublished opinion, after citing to subsections (a)(2) and (d) of article 44.01 and acknowledging that, so long as the State filed its notice of appeal no later than 20 days after the order was signed by the trial judge, the State was entitled to appeal a shock-probation order (a type of order that modifies the judgment of conviction), the Eighth Court held that the State's July 13, 2015, notice of appeal was ten days late because the amended, June 25, 2015, order did nothing to restart the appellate timetable in that, despite the trial court's entering of numerous, previously unpronounced findings of fact therin, it "did not include any substantive changes to the initial order placing Hanson on [shock probation]." *See Hanson*, 2017 WL 3167484 at *2-3. Thus, the Court dismissed the State's appeal for lack of jurisdiction. *Id*. at *3. For the reasons that follow, by effectively holding that the State did not appeal from an "appealable order" when it appealed from the amended (rather than original) order, the Eighth Court, contrary to its plain language, improperly read into article 44.01 an additional

requirement that the appealed-from order be a first-in-time, stand-alone, or sole order. *See* TEX. CODE CRIM. PROC. art. 44.01(a),(d).

When a reviewing court interprets a statute, in seeking to effectuate the collective intent or purpose of the statute's enacting legislators, the court should focus its attention on the literal text of the statute in question and attempt to discern the fair, objective meaning of that text at the time of its enactment. *See State v. Robinson*, 498 S.W.3d 914, 920 (Tex.Crim.App. 2016)(citing *Boykin v. State*, 818 S.W.2d 782, 785 (Tex.Crim.App. 1991)). If, under the established canons of construction, the meaning of the statutory text should have been plain to the legislators who voted on it, the reviewing court should ordinarily give effect to that plain meaning. *See id*. Only when the plain meaning of the statute is ambiguous or would lead to absurd results that the legislature could not have intended should the reviewing court look beyond the text and consult extratextual sources. *See id.*[7] Thus, "[w]hen the literal text of a statute is clear, an appellate court must give effect to the statute's plain language and purposely eschew reliance on its legislative history." *State v. Muller*, 829 S.W.2d 805, 808

[7] Similarly, a reviewing court should attempt to effectuate the plain language of a court rule unless there are important countervailing considerations, though, unlike the standard for construing statutes, a reviewing court may consider extratextual factors, even in the absence of ambiguity in the rule's text or absurd results. *See Bruton v. State*, 428 S.W.3d 865, 873 (Tex.Crim.App. 2014).

(Tex.Crim.App. 1992).

The State's limited right to appeal is set out in article 44.01 of the Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. art. 44.01; *see also State v. Riewe*, 13 S.W.3d 408, 411 (Tex.Crim.App. 2000)(recognizing the State's right to appeal as limited). In setting out the parameters of the State's limited right to appeal, article 44.01 identifies which types of orders the State may appeal and states, in pertinent part:

> (a) The state is entitled to appeal an order of a court in a criminal case if the order:
>
> (1) dismisses an indictment, information, or complaint...;
>
> (2) arrests or **modifies a judgment**;
>
> (3) grants a new trial;
>
> (4) sustains a claim of former jeopardy;
>
> (5) grants a motion to suppress evidence, a confession, or an admission,...; or
>
> (6) is issued under Chapter 64.

TEX. CODE CRIM. PROC. art. 44.01(a)(1)-(6)(emphasis added). In setting out the limitations period within which the State must pursue an appeal permitted under the statute, article 44.01 then states:

> (d) The prosecuting attorney may not make an appeal under Subsection

> (a)... of this article later than the 20th day after the date on which the order, ruling, or sentence **to be appealed** is entered by the court.

TEX. CODE CRIM. PROC. art. 44.01(d)(emphasis added).[8]

The plain language of subsection (a), setting out the "types" of orders that may be appealed, indicates that the State may only take an appeal of those enumerated classes of orders—*i.e.*, those dismissing an information or indictment, arresting or modifying a judgment, granting a new trial, *etc.*. *See* TEX. CODE CRIM. PROC. art. 44.01(a)(1)-(6). And in providing that the State must make its appeal within 20 days of the order "to be appealed," subsection (d) further indicates that, whatever order encompassed within the classes enumerated in subsection (a) the State chooses to appeal, it must be appealed from within 20 days. *See* TEX. CODE CRIM. PROC. art. 44.01; *see Muller*, 829 S.W.2d at 810 (similarly reasoning that the plain language of subsection (d) limits the amount of time in which the prosecuting attorney may make an appeal and governs appeals taken under the preceding subsections (a)(1) and (a)(5)).

Reading the statute as a cohesive, integrated whole, it is apparent that, in

---

[8] Rule 26.2, governing the limitations periods for filing appeal in a criminal case, similarly provides that, in appeals by the State, "[t]he notice of appeal must be filed within 20 days after the day the trial court enters the order, ruling, or sentence **to be appealed**." TEX. R. APP. P. 26.2(b)(specifically setting out the time to perfect a State's appeal in a criminal case)(emphasis added).

limiting the time within which the State may take appeal of an order encompassed in subsection (a) by providing that the State must make its appeal within 20 days of the order "to be appealed," subsection (d) not only relates back to those preceding subsections defining the State's right to appeal in terms of which *types* of orders give rise to that right, but also limits the State's substantive right to appeal to the extent that it requires that the order "to be appealed" fall within one of the enumerated classes set out in subsection (a), and *only* to that extent. *See* TEX. CODE CRIM. PROC. art. 44.01(a)-(b), (d). That is, the State may make an appeal of any order as long as: (1) it is of a type enumerated in subsection (a); and (2) whatever the order enumerated in subsection (a) the State decides to appeal, the State makes its appeal within the allotted 20 days. *See* TEX. CODE CRIM. PROC. art. 44.01(a)-(b), (d). Thus, because an order modifying a judgment falls under one of the categories listed in subsection (a), the State is allowed to appeal such order modifying a judgment (*i.e.*, the order "to be appealed") so long as it files notice of appeal within 20 days after the court enters the order. *See* TEX. CODE CRIM. PROC. art. 44.01(a), (d).

Simply, in setting out the parameters of the State's right to appeal and identifying the types of orders that are appealable by the State, article 44.01 makes no distinction between a "first-in-time" type or "stand alone" type of appealable

order and its "amended" counterpart. *See* TEX. CODE CRIM. PROC. art. 44.01(a). In other words, an "amended" order of a qualifying *type* under subsection (a), *i.e.*, an "amended" judgment-modifying order, an "amended" suppression order, an "amended" new-trial order, *etc*., is still an order modifying a judgment, suppressing evidence, granting a new trial, *etc*., and is thus appealable under subsection (a). *See* TEX. CODE CRIM. PROC. art. 44.01(a). The mere fact that an order modifying a judgment is "amended" does not change the nature of the order—it is still an order modifying a judgment, and it would defy logic to categorize it as anything but. *Cf. Ahmed v. Shimi Ventures, L.P.*, 99 S.W.3d 682, 688-89 (Tex.App.–Houston [1st Dist.] 2003, no pet.)(holding that, under TEX. CIV. PRAC. & REM. CODE § 51.014(a)(4), which grant of interlocutory jurisdiction the legislature intended to be narrow, "given the similarity of [the order modifying an injunction order] to the others listed in section 51.014(a)(4)," the court had jurisdiction over an order *modifying* a temporary injunction order even though it "[was] not exactly an order that 'grants or refuses a temporary injunction or grants or overrules a motion to dissolve a temporary injunction," as provided by the statute); *see also In re Search Warrant Seizure*, 273 S.W.3d 398, 400 (Tex.App.–San Antonio 2008, pet. ref'd)(agreeing that article 44.01 should be liberally construed). Thus, because the June 25, 2015, "amended" shock-

probation order is still a shock-probation order, *i.e.*, an order modifying a judgment, it falls under the enumerated classes of appealable orders under subsection (a), and the State properly appealed therefrom.[9]

For these reasons, by effectively holding that the State did not appeal from an "appealable order" when it appealed from the amended (rather than original) order, the Eighth Court improperly read an additional requirement into article

---

[9] As this Court has previously noted, the legislative purpose behind article 44.01 is to limit the State's ability to seek appellate review of only certain types of actions taken by a trial court so that a defendant is not trapped "in a continuing cloud of criminal charges" as a result of indiscriminate or frivolous appeals by the State. *See State v. Redus*, 445 S.W.3d 151, 155 (Tex.Crim.App. 2014)("[44.01's statutory requirements] are to ensure that prosecutors do not appeal trial judges' rulings indiscriminately and clog up the appellate courts while leaving the defendant under the continuing cloud of criminal charges."). Permitting the State to appeal the suspension of a prison sentence via an "amended" order rather than an original order in no way interferes with that purpose—the State's right to appeal is still limited to those instances where a trial court has taken a specific action, here, the suspension of a prison sentence via the grant of shock probation. Thus, permitting the State to appeal an "amended" shock-probation order does not transform the State's right of appeal into a dangerously indiscriminate one.

Furthermore, if article 44.01 did not permit the State to appeal an "amended" order, in order to foreclose the possibility that it might forfeit its right to complain about the objectionable judicial action should the appellate courts determine that the State chose to appeal the "wrong" order, upon the expiration of 20 days from the trial court's original order, the State would be forced, as a matter of course, to take appeal from any original order and as many "amended" orders that a trial court subsequently may have entered within the 20-day period—an absurd result that the legislature could not have intended. *See Robinson*, 498 S.W.3d at 920 (citing *Boykin*, 818 S.W.2d at 785). For example, in this case, if the State filed its notice of appeal on July 5, 2015 (the 20th day from the trial court's original, June 15, 2015, order), the State would also have to take appeal from the court's amended, June 25, 2015, order, which would be encompassed within the 20-day period from the original order. And if the trial court entered yet a second amended order on the 20th day (July 5, 2015), the State would have to take appeal from that third order as well. Thus, the State would be forced to not only file notice of appeal on all three orders, but would have to actually complain, in piecemeal fashion, about each and every order, which, again, is an absurd result the legislature could not have intended.

44.01, namely, that in addition to falling within one of the classes of orders enumerated in subsection (a), the order "to be appealed" must be a first-in-time, stand-alone, or sole order. *See* TEX. CODE CRIM. PROC. art. 44.01(a),(d). Such a construction is contrary to the plain language of article 44.01(d)'s requirement that the State simply appeal within 20 days after the order "to be appealed" is entered by the trial court. *Cf. In re Trentacosta*, No. 04-13-00057-CR, 2013 WL 1342468, at *1 (Tex.App.–San Antonio April 3, 2013, orig. proceeding)(mem.op.)(not designated for publication)(under TEX. R. APP. P. 26.2(b), the defendant may appeal within 30 days of when the trial court enters an "appealable order," and an amended order denying the defendant's DNA motion was such an "appealable" order).

By construing article 44.01 as applying solely to an original order, to the exclusion of an otherwise appealable "amended" order (in that the amended order modified the judgment of conviction—an order defined as appealable under subsection (a) of article 44.01), the Eighth Court failed to give effect to the plain language of article 44.01 and thus erred in dismissing the State's appeal for lack of jurisdiction. *See Robinson*, 498 S.W.3d at 920. For this reason alone, the Eighth Court's judgment should be reversed.

<u>GROUND FOR REVIEW TWO</u>: Where, by entering an amended order, the trial court indicated its intent to supercede its original shock-probation order, and where the trial court's amended order contained additional fact findings that were a statutory prerequisite to the proper granting of shock probation, the Eighth Court erred in holding that it was the original (not the amended) order that constituted an "appealable" order. The State's notice of appeal from the amended order was therefore timely.

I. Where the trial court indicated its intent to replace its original order, the amended order superceded the original order, making the State's appeal therefrom proper and timely.

As discussed above, the Eighth Court held that because the amended shock-probation order did not include any "substantive" changes to the original order and (unlike the original order) did nothing to modify the judgment of conviction, it did not restart the appellate timetables, such that the State was required to file its notice of appeal within 20 days of the *original* order for it to be timely. *See Hanson*, 2017 WL 3167484 at *2-3. In so holding, the Eighth Court rejected the State's contention that because the amended order replaced and superceded the original order, its notice of appeal, filed before the expiration of 20 days from the June 25, 2015, amended order, was timely. *See Hanson*, 2017 WL 3167484 at *2-3.

This aspect of the Eighth Court's reasoning was based on its refusal to apply basic procedural principles that, although primarily developed in the civil context, should apply equally in the criminal context. *See State v. Antonelli*, No. 05-99-

01907-CR, 2001 WL 29153, at *2 (Tex.App.–Dallas Jan. 12, 2001)(not designated for publication)(reasoning that although the legal principles dictating which order survives when a trial court enters an amended order arose in the context of civil disputes, "the well-established concepts they assert are equally applicable in criminal cases"), *rev'd*, *State v. Antonelli*, No. PD 958-01 (Tex.Crim.App. Sept. 11, 2002)(not designated for publication).[10, 11]

One such basic principle is that when a trial judge enters an amended order, rather than a supplemental order, it is presumed to have intended to replace its original order. As the State noted in its notice of appeal, *see* (CR:360-62), regardless of whether the additions in the amended order were material or substantial, because the trial court is presumed to have intended to replace its original order by entering an amended order, the appellate timetables start from the

---

[10] In its unpublished opinion on discretionary review, this Court reversed the San Antonio Court of Appeals' holding that, because the trial court's amended order—which contained the "full ruling of the court" on appellee's motion to quash—superceded the original order, the original, superceded order, was not appealable. *See Antonelli*, slip op. at 3-4, 6-7. This Court reasoned that the "second-judgment" rule developed in civil case law was inapplicable in a criminal context in which an original order (rather than a judgment) contained a ruling and a second order contained the "reasoning or legal conclusion supporting that ruling." *See id.* at 6-7. Instead, this Court reasoned that the second order, regardless of its title and the trial court's statement that it reflected the "entire order," was not a "stand-alone" order and did not, in itself, dispose of the motion to quash. *See id.* at 5. However, for reasons that will be discussed below, the facts of this case are distinguishable, such that the trial court's amended order in this case was, indeed, "appealable."

[11] Because this Court's unpublished opinion is not available on Westlaw, the State obtained a copy of the opinion directly from this Court (attached to the State's PDR).

entry of the amended order rather than the original. *Cf. Check v. Mitchell*, 758 S.W.2d 755, 756 (Tex. 1988)("We hold that any change, whether or not material or substantial, made in a judgment while the trial court retains plenary power, operates to delay the commencement of the appellate timetable until the date the modified, corrected or reformed judgment is signed."); *City of West Lake Hills v. State ex rel. City of Austin*, 466 S.W.2d 722, 727 (Tex. 1971)(when the trial court enters an amended or corrected order, it is presumed that the trial court intended to replace the original order, such that the appellate timetables start from the entry of the amended order); *see also Quanaim v. Frasco Restaurant & Catering*, 17 S.W.3d 30, 38-39 (Tex.App.–Houston [14th Dist.] 2000, pet. denied)(noting the evolution and continuing viability of the *Check* rule).

To hold otherwise would lead to the illogical conclusion that the State must appeal from a subsequently superceded, nullified order, as, once amended, the original order ceases to have legal effect and is no longer susceptible to appeal. *See Black v. Shor*, 443 S.W.3d 170, 175-76 (Tex.App.–Corpus Christi 2013, no pet.)(holding that for purposes of determining what constituted the appealable order, the amended order is the appealable order: "Ordinarily, an amended final order supercedes any prior final order when the 'order amounts to something more

than marking through an earlier date and substituting another date on the final order.'...When the trial court signs an amended order, the original order becomes 'a nullity.'...As the original judgment ceases to have legal effect, only the amended judgment can support an appeal."); *Ferguson v. Naylor*, 860 S.W.2d 123, 127 (Tex.App.–Amarillo 1993, writ denied)(holding that once a judgment or order has been reformed, it is superceded and is effectively dead and not susceptible to appeal).

As such, the State's appeal from the trial court's amended order, which the trial court intended to replace its previous, original order,[12] was timely and proper, and the Eighth Court's holding to the contrary was erroneous. *See Shor*, 443 S.W.3d at 175-76; *City of West Lake Hills*, 466 S.W.2d at 727.

II. Where it was in its *amended* order that the trial court first satisfied the statutory requirements for the proper granting of shock probation by making and entering the required findings of fact, such "substantive" changes were sufficient to make the amended order "appealable."

Notwithstanding the Eighth Court's characterization of the changes contained in the amended order as "non-substantive," here, the trial court rendered in its amended order previously unpronounced findings of fact that were not only a

[12] Additionally, for the reasons to follow, by not only designating its subsequent order as "amended," but also undertaking—for the first time—to properly fulfill the statutory requirements for the lawful grant of shock probation, the trial court manifested its intent that its amended order be the only legally effective order and to nullify its original order.

result of judicial reasoning and determination, but were also a necessary prerequisite for the trial court's shock-probation ruling. Thus, it was in the trial court's amended order that the trial court sought to effectuate, for the first time, a complete and final grant of shock probation.

Thus, this case is distinguishable from *Antonelli*, where the trial court granted the defendant's motion to quash but entered an "amended order" a few days later in order to further explain its ruling and thus "reflect the full ruling of the [c]ourt." *See Antonelli*, slip op. at 3-5. The trial court's November 3, 1999, "amended order," which referenced its earlier, October 22, 1999, ruling granting the motion to quash, simply remarked that the trial court had concluded that the statute under which the defendant had been charged was unconstitutional on its face and as applied to him—a legal conclusion that the trial court had previously orally pronounced on the record at the October 22, 1999, hearing but had not included in its original, written order. *Antonelli*, slip op. at 5. Thus, this Court held that, unlike the original order, the amended order, by providing nothing more than a mere "explanation" for the trial court's earlier ruling, could not stand alone. *Id*.

But here, the trial court did not, in its amended order, simply "explain" its earlier ruling placing Hanson on shock probation. The shock-probation statute

specifically provides that a trial judge may suspend further execution of a defendant's sentence "*if* in the opinion of the judge the defendant would not benefit from further imprisonment," *see* TEX. CODE CRIM. PROC. art. 42.12 § 6(a)(emphasis added), thus expressly requiring that a trial judge first make such a determination before shock probation may properly be granted. *See State v. Dean*, 895 S.W.2d 814, 815 (Tex.App.–Houston [14th Dist.] 1995, pet. ref'd); *State v. Lima*, 825 S.W.2d 733, 734 (Tex.App.–Houston [14th Dist.] 1992, no pet.)(cases holding that the shock-probation statute requires that the trial judge find that the defendant would not benefit from further incarceration). The record reflects that, prior to its amended order, the trial court had not yet determined whether Hanson would benefit from further imprisonment, as it was in his *amended* order that the trial judge first determined that: (1) Hanson generally complied with all previous bond conditions; (2) Hanson's previous release was due to medical reasons; (3) Hanson "maintains a good relationship with his children and is in compliance with all legal support obligations;" and (4) further incarceration would not only hinder Hanson's efforts to seek additional medical testing for himself and his children, but would also create an undue hardship on him, his children, and his parents—all of which, in turn, provided the underlying factual bases for the trial court's ultimate, statutorily required judicial determination made for the first time in the

amended order that, "[f]urther imprisonment would not benefit [Hanson]." (CR:353-56). And unlike the *Antonelli* trial court's amended order—which simply repeated its earlier, orally pronounced legal conclusions in support of its ruling—none of these judicial determinations of fact were orally pronounced at the shock-probation hearing, nor were they included in the trial court's original, written order. (CR:340-42); (RR4:56).

Thus, it was in its amended, June 25, 2015, order that the trial court—for the first and only time—satisfied all statutory prerequisites of the shock-probation statute, and thus, it was the *amended* order that operated to properly[13] complete the granting of shock probation and suspension of further execution of Hanson's sentence, not the original. *See Dean*, 895 S.W.2d at 815; *Lima*, 825 S.W.2d at 734.

Simply, unlike the amended order in *Antonelli* —which merely "explained" the trial court's previous ruling—the amended order in this case was a stand-alone order that, for the first and only time, fully dispensed of the trial court's *sua sponte* motion for shock probation. As such, *Antonelli* does not apply here.

Rather, as the San Antonio Court of Appeals suggested in *Ex parte*

---

[13] The State's use of the word "proper" should not be construed as a waiver of the State's contention on appeal that the trial court's grant of shock-probation was improper in light of the terms of the plea agreement between Hanson and the State.

Matthews, the additional determination of a fact, which is defined as a judicial determination on the evidence before a judge, may serve to restart the appellate timetables if made, as here, within a trial court's 30-day plenary-power period. *See Ex parte Matthews*, 452 S.W.3d 8, 13-14 (Tex.App.–San Antonio 2014, no pet.)(holding that because the trial court entered its findings of fact after its plenary power had expired, "they could not...extend or reset the appellate timetable," implying that if the findings had been entered before the expiration of the court's plenary power, they would have reset the appellate timetables); BLACK'S LAW DICTIONARY (10th ed. 2014)(defining a finding of fact as a determination by a judge supported by the evidence in the record).

It is this endeavor by the trial court to make an additional judicial determination on the evidence before it that Hanson would "not benefit from further incarceration" that constituted the *only* complete, statutorily compliant grant of shock probation, and thus a stand-alone "appealable" order. *See Dean*, 895 S.W.2d at 815; *Lima*, 825 S.W.2d at 734 (cases holding that the shock-probation statute requires that the trial judge find that the defendant would not benefit from further incarceration).

Consequently, even if it did not misconstrue the plain language of article 44.01, the Eighth Court erred in holding that the State erroneously and untimely

appealed from the amended order and dismissing the State's appeal for lack of jurisdiction. *See Ex parte Matthews*, 452 S.W.3d at 13-14; *Dean*, 895 S.W.2d at 815; *Lima*, 825 S.W.2d at 734.

CONCLUSION

In holding that the trial court's amended shock-probation order, despite being a type of order identified as appealable under the plain language of article 44.01, was not "appealable," the Eighth Court failed to give effect to the plain language of article 44.01 and thus erred. Furthermore, where the trial court not only indicated its intent to supercede its original order, but also made additional judicial determinations that were a statutory prerequisite for the proper granting of shock probation in the first place, the trial court's amended order contained "substantive" changes sufficient to make it a stand-alone, "appealable" order. For these reasons, this Court should reverse the judgment of the Eighth Court and hold that the State's appeal from the amended, June 25, 2015, shock-probation order was proper, that its July 13, 2015, notice of appeal was timely, and that the State's appeal was thus properly before the Eighth Court.

PRAYER

WHEREFORE, the State prays that this Court reverse the Eighth Court's judgment and remand this case to the Eighth Court for consideration of the merits of the State's appeal.

JAIME ESPARZA
DISTRICT ATTORNEY
34th JUDICIAL DISTRICT

/s/ Raquel López
RAQUEL LOPEZ
ASST. DISTRICT ATTORNEY
DISTRICT ATTORNEY'S OFFICE
201 EL PASO COUNTY COURTHOUSE
500 E. SAN ANTONIO
EL PASO, TEXAS 79901
(915) 546-2059 ext. 4503
FAX (915) 533-5520
raqlopez@epcounty.com
SBN 24092721

ATTORNEYS FOR THE STATE

CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the foregoing document, beginning with the factual summary on page 1 through and including the prayer for relief on page 27, contains 6,262 words, as indicated by the word-count function of the computer program used to prepare it.

/s/ Raquel López
RAQUEL LOPEZ

CERTIFICATE OF SERVICE

(1) The undersigned does hereby certify that on November 30, 2017, a copy of the foregoing petition for discretionary review was sent by email, through an electronic-filing-service provider, to appellant's attorney: Ruben P. Morales, rbnpmrls@gmail.com.

(2) The undersigned also does hereby certify that on November 30, 2017, a copy of the foregoing petition for discretionary review was sent by email, through an electronic-filing-service provider, to the State Prosecuting Attorney, information@SPA.texas.gov.

/s/ Raquel López
RAQUEL LOPEZ